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Issue Date: 26 November 2008

OALJ Case No.: 2009-TLC-00013
ETA Case No.: C-08248-14690

In the Matter of

DAIRY FOUNTAIN, INC.,
Employer

Certifying Officer: Robert E. Myers
Chicago Processing Center

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the implementing regulations at 20 C.F.R. Part 655, Subpart B.[1] On November 7, 2008, Dairy Fountain, Inc., ("Employer") requested expedited administrative review of the Certifying Officer's October 31, 2008, denial of its application for temporary alien labor certification. *See* §§ 655.104(c), 655.112(a). On the evening of November 19, 2008, the Office of Administrative Law Judges received the administrative file from the United States Department of Labor's Employment and Training Administration ("ETA"). On November 14, 2008, this office issued an *Order Setting Briefing Schedule* permitting the parties to file briefs no later than 4:30 pm EST on Friday, November 21, 2008. The order also required that the parties discuss resolving the matter and provide a status report at the time either filed any additional brief. On November 19, 2008, the Employer filed copies of documents purportedly supporting its legal position; noticeably absent from the filing was a report on settlement discussions between the parties.[2] On November 21, 2008, the CO timely filed a brief and a status report explaining that the parties have been unable to reach a settlement in the case.

Statement of the Case

The Employer is a Texas farming operation that grows alfalfa, corn, sorghum, and wheat for feed production. AF 86.[3] On September 3, 2008, the Employer filed its application for temporary labor certification. AF 84. Specifically, the Employer requested certification for six

[1] Unless otherwise noted, all regulations cited in this decision are in Title 20 of the Code of Federal Regulations.
[2] Documents that were not part of the administrative file will not be considered in this expedited administrative review. *See* § 655.112(a)(1).
[3] Citations to the 113-page Administrative File will be abbreviated as "AF" followed by the page number.

temporary workers who would assist with planting, cultivating, harvesting, cutting, chopping, and swathing crops from November 1, 2008, until September 1, 2009. AF 86, 87.

On September 10 2008, Marie Gonzalez, the certifying officer who reviewed the Employer's initial application, informed the Employer that its application was "not being accepted for consideration" and requested certain modifications. AF 74-76. First, noting that Texas has no state income tax, Ms. Gonzalez requested that the Employer delete references to state income tax withholdings from its ETA 790 form. AF 76. Second, she requested that the Employer delete a reference to payroll deductions for electricity from its ETA 790 form. AF 76. Third, Ms. Gonzalez requested that the Employer modify its ETA 790 form to include a Spanish translation of the job offer. AF 76. Fourth, she requested that the Employer amend its ETA 790 form to include the specific crops that the workers will plant and harvest. AF 76. Finally, she requested that the Employer amend its ETA 790 form to reflect that it will reimburse certain transportation costs at rates required by § 655.102(b)(5).

On September 16, 2008, the Employer filed its modified application. AF 63-73. On September 17, 2008, the CO informed the Employer that he had accepted the application for processing and provided further instructions for obtaining certification. AF 58-60. Notably, the CO directed the Employer to submit the name of its workers' compensation insurance carrier and policy number or "proof of state law coverage" by October 2, 2008. AF 60. On October 2, 2008, the Employer filed, *inter alia*, a liability insurance policy certificate. AF 48. The preprinted certificate contains various types of insurance and blank fields into which the preparer could enter the terms of any policies provided. AF 48. The "workers' compensation and employers' liability" fields are blank. AF 48. Immediately below that row, however, in the field for "other" types of insurance, the preparer typed, "Occ/Acc." AF 48. The certificate contains terms for the "Occ/Acc" policy and includes both the carrier's name and policy number. AF 48.

In an October 6, 2008, e-mail, ETA informed the Employer that its policy "does not appear to be equivalent to workers' compensation" and requested that the Employer submit documentation of adequate coverage. AF 21. In an October 7, 2008, e-mail, the Employer filed a copy of its Occupational Injury Benefit Plan and requested that ETA review it for an equivalency determination. AF 21. In an October 10, 2008, e-mail, ETA informed the Employer that the benefits its plan offers are "not equivalent to workers' compensation coverage" and again renewed its requested for proof of adequate coverage. AF 20. In an October 15, 2008, e-mail, the Employer requested specific input into what the policy lacked. AF 19. On or around October 17, 2008, ETA directed Employer to the Texas Division of Workers' Compensation regarding the plan's specific deficiencies. AF 19.[4]

On October 23, 2008, the Employer filed a letter explaining that the Texas Division of Workers' Compensation referred the Employer to the state's elective workers' compensation insurance act. AF 7, 8. The Employer also explained that its existing policy "provides comprehensive benefits for work-related injuries including medical expenses, weekly disability, accidental death & dismemberment, occupational disease and cum[u]lative trauma." AF 7, 8.

[4] The administrative file does not contain a copy of the e-mail ETA actually sent to the Employer. Rather, it contains correspondence between ETA staff members that includes instructions to refer the Employer to the Texas Division of Workers' Compensation "regarding their question(s)." AF 19.

The Employer added that "[t]here are no out of pocket expenses for the injured employee as we as employer pay 100% of the policy deductible." AF 8. The Employer concluded the letter by offering to provide any additional information and enclosed copies of several Texas statutes and printouts from ETA's website. AF 8-18.

On October 31, 2008, the CO denied the Employer's application. AF 5. In the denial letter, the CO explained that the Employer did not comply with § 655.102(b)(2):

> The employer has not provided evidence that they have a current workers' compensation policy. Instead, Fountain Dairy [sic] has submitted an Occupational Injury Benefit plan for their employees in place of acquiring the State workers' compensation. It has been determined that the Occupational Injury Benefit Plan is not equal to those provided under the state workers' compensation law. The employer failed to demonstrate that its Occupational Injury Benefit plan was at least equal to those provided under the State Workers' Compensation law as required by 20 CFR 655.102 (b)(2).

AF 5. The Employer's appeal followed.

Discussion

At the outset, the CO argues that this office lacks jurisdiction to hear this appeal because a representative from the Employer's insurance company, John David Bryant, actually filed the request for administrative review. *See* AF 1-2. Section 655.105(e) permits employers to request an appeal before this office and contains no prohibition on agent's requesting review upon behalf of employers. While an agent must provide certain documentation of an agency relationship when filing an H2-A application on behalf of an employer, the appeals provisions contain no such requirement. *See* § 655.101(a)(2). Mr. Bryant clearly acted as the Employer's agent in requesting an appeal. Furthermore, the Employer has ratified Mr. Bryant's agency by apparently coordinating his response to the *Order Setting Briefing Schedule*, which was served only upon the Employer. The fact that the Employer used a different agent—Federation of Employers and Workers of America—when filing its initial application has no impact on Mr. Bryant's ability to request review on behalf of the Employer or on this office's ability to hear the appeal.

The regulations relating to administrative review of H-2A determinations direct the administrative law judge to review the record "for legal sufficiency" and render a decision within five working days after receipt of the case file. § 655.112(a)(2). Under § 655.112(a)(1), the administrative law judge may not receive additional evidence or remand the matter in the course of this review. On the basis of the written record and after due consideration of any written submissions, the administrative law judge is required to "either affirm, reverse, or modify the OFLC Administrator's denial by written decision." § 655.112(a)(2). However, in H-2A cases, the employer bears the burden of demonstrating its compliance with the regulations.

Since the regulations do not define "legal sufficiency," I apply an arbitrary and capricious standard when conducting expedited administrative review under § 655.112(a)(2). *See Bolton Springs Farm*, 2008-TLC-00028, slip op. at 6 (ALJ May 16, 2008). The CO found only that the Employer failed to establish that its plan complies with § 655.102(b)(2), which provides:

> *Workers' Compensation*. The employer shall provide, at no cost to the worker, insurance, under a State workers' compensation law or otherwise, covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law, if any, for comparable employment. The employer shall furnish the name of the insurance carrier and the insurance policy number, or, if appropriate, proof of State law coverage, to the OFLC administrator prior to the issuance of a labor certification.

The CO's precise basis for denying the application is indiscernible from the administrative file. The CO did not explain what he relied upon in determining that the Employer's plan fails to provide coverage equivalent to that provided under Texas workers' compensation law. The denial contains no reference to the sources of Texas law that the CO considered or the specific provisions of the Employer's plan found to be deficient. Other communications within the file fail to shed light on the CO's reasoning. For example, when the Employer requested assistance in altering its plan to comply with the H-2A program's requirements, ETA did not identify the specific modifications sought. While the CO's brief contains specific criticisms of the Employer's plan, these are merely post hoc arguments made by counsel. They do not qualify as evidence of the decisional process in which the CO actually engaged when he denied the application.

The CO's failure to provide specific guidance to the employer's requests approaches the "arbitrary and capricious" standards. However, based on the record of the case, I do not believe that the employer has met his burden of proof. While the employer has provided evidence of a liability insurance policy and a copy of the Texas Labor Code, the submissions do not clearly demonstrate that the liability policy qualifies under the State of Texas's scheme for workers compensation. Based on the record before me, I cannot find that the employer has complied with the H2-A regulations.

IT IS ORDERED that the Certifying Officer's decision is affirmed.

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JOHN M. VITTONE
Chief Administrative Law Judge